Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1997 TERM

LeRoy L. Walters,
Petitioner

v.

Alan C. Metzger

and

Joan M. Day,
Respondents

On Petition for Writ of Certiorari
to the Pennsylvania Supreme Court
No. 181 M.D. Misc. Dkt. 1997

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does due process require the nullification of all prior proceedings prior to the joinder of an indispensable party?

2. Does an appeal by an indispensable party involve a matter of jurisdiction of the person pursuant to Pennsylvania Rule of Appellate Procedure 311(b)?

PARTIES TO THE PROCEEDING

Parties to this proceeding are LeRoy L. Walters and his wife, Joan Day Walters, and Alan C. Metzger, Petitioner in the court of original jurisdiction.

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Petitioner, LeRoy L. Walters, an individual, and husband of Joan M. Walters, respectfully petitions for a Writ of Certiorari to review the Judgment denying review of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The Opinions of the Court of Common Pleas of Pennsylvania (Appendix A, infra), the Opinion of the Pennsylvania Superior Court (Appendix B, infra). See the Order of the Pennsylvania Supreme Court (Appendix C). None of these Opinions are reported.

JURISDICTION

(1) CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amended 14 §1. Citizens of the United States. All persons born or naturalizing .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person

within his jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the Court of Common Pleas arises pursuant to jurisdiction is provided for the Courts of Common Pleas (here Lycoming County) by Pennsylvania Statute (42 **Pa. C.S.A. §931**) of the statutes of Pennsylvania.

B. THE FACTS

On March 5, 1992, Plaintiff filed a petition to establish paternity. Subsequently, on April 10, 1992, Plaintiff filed a complaint requesting partial custody. The Court initially issued an Order directing blood tests on April 23, 1992, but subsequently vacated the Order when Defendant, Joan Day, raised the defense that the child was born to a common-law marriage, and therefore, it was improper to order blood tests. On June 22, 1992, Joan Day filed a Motion for Declaratory Judgment of common-law marriage. The two

matters were consolidated for hearing on November 9, 1992.

At the hearing of November 9, 1992, the Intervening Defendant, LeRoy L. Walters, was excluded from the courtroom for all of the testimony taken except his own, was not represented by counsel, did not have an opportunity to examine or cross-examine witnesses and was not a party to the case.

On January 25, 1993, the Court determined that Defendant Joan Day and LeRoy L. Walters had entered into a common-law marriage. The Court also directed paternity testing, finding that the traditional presumption that a husband is a presumptive father of a child born to his wife did not apply, whereas here, the child was conceived prior to the existence of the marriage. An appeal by Joan Day to the Superior Court affirmed the trial court's order by opinion filed on January 14, 1994. Allocatur was denied by the Supreme Court of Pennsylvania on October 26, 1994. Thereafter, on January 9, 1995, LeRoy L. Walters filed a

Petition in the new caption **LeRoy L. Walters v. Alan C. Metzger** in the Court of Common Pleas of Lycoming County, Pennsylvania No. 95-20046. This Petition requested an Order preventing blood testing of Jabe Walters, which was scheduled for January 10, 1995 and also requested the Court to declare that Jabe Walters was a child of the marriage of Joan Day Walters and LeRoy L. Walters, that LeRoy L. Walters is irrebuttably and conclusively presumed to be the father of Jabe Walters and that requiring the blood testing previously petitioned would be a useless act and that any blood testing to be taken in the matter could not allow the Court to determine that LeRoy L. Walters is not the father of Jabe A. Walters and; that LeRoy L. Walters may either intervene in the action or have this petition designated a concurrent action and consolidated with the action previously filed to Court of Common Pleas of Lycoming County No. 92-20,372.

Thereafter, the Lycoming County Court of

Common Pleas, Judge Smith, after motion of LeRoy L. Walters, denied the petition on January 10, 1995. On January 20, 1995, LeRoy L. Walters petitioned for reconsideration on the ground that the Court's original opinion of January 25, 1993 misstated the date of the common-law marriage, and thus creates an ambiguity which may have resulted in the Supreme Court's refusal to grant allocatur. The Court corrected its typographical errors by its order filed on February 7, 1995. From these orders an appeal was taken to the Superior Court of Pennsylvania by LeRoy L. Walters on February 9, 1995. The appeal in No. 150 Harrisburg 1995 was quashed by the Superior Court on May 10, 1995 and the appeal of the other caption, No. 141 Harrisburg 1995, was dismissed on May 10, 1995 as moot. The petition for allocatur to the Supreme Court of Pennsylvania was filed on June 12, 1994 and was returned by the court on June 13, 1995 because it was filed late.

The petition of LeRoy L. Walters to

intervene as an indispensable party, inter alia, in the case of **Metzger v. Day**, 92-20,372 was filed on July 10, 1995 and was granted by the Court of Common Pleas on October 31, 1995. LeRoy L. Walters filed Preliminary Objections challenging the jurisdictional basis of the prior proceedings on November 20, 1995 and the hearing in this matter was scheduled for January 19, 1996.

In the case at bar, LeRoy L. Walters was not made a party to this case until October 31, 1995 in spite of the fact that he previously petitioned to intervene and previously attempted to appeal from the decision in Metzger and Day and also filed a separate action requesting, inter alia, intervention.

On October 31, 1995, the Court, Judge Smith presiding, (R 414A-446A, inclusive) granted the Petition of LeRoy Walters to intervene in this matter. The Court stated (R 427A) that LeRoy Walters was an indispensable party in both the paternity and custody claims (R 426A); however, the Court refused to

allow argument on the nullity of prior proceedings (R 429A).

On June 4, 1996, the Court, Brown, J., by Order denied the Preliminary Objections of LeRoy Walters, Intervening Defendant. The Court's Opinion is set forth (R 469A-472A). The Court stated in its Opinion that it could not overrule the decisions of a prior judge in the case on the basis that the prior judge's decision was "the law of the case." However, Judge Smith did not allow argument of the matter of the consequences of indispensability of LeRoy Walters to the case, but merely prohibited argument on the same.

The Court's Opinion also stated that after review of the transcript and conferring with Judge Smith, "proceedings not being a nullity are consistent. Judge Smith found that Mr. Walters was indispensable as of October 19, 1995 and for all subsequent proceedings, but he was not indispensable for the proceedings which occurred prior to October, 1995." The transcript of the hearing of

October 31, 1995 no where provides such a description. (R 414A-446A, inclusive).

The Court went on to state three (3) reasons why Mr. Walters was not indispensable initially (R 470A):

> 1. The initial proceeding was to compel blood testing of Ms. Day and the child; Plaintiff was not seeking relief from Mr. Walters. See **Centolanza v. Lehigh Valley Dairies, Inc.**, 540 Pa. 398, 658 A2d 336 (1995).
>
> 2. Mr. Walters was present at the November, 1992 proceedings and testified.
>
> 3. Mr. Walters' interest, including but not limited to, preserving the family unit were skillfully presented by Ms. Day and her attorney.

Mr. Walters was not represented by Ms. Day's attorney, Ms. Yaw, at the time of the original testimony taken in this matter. Furthermore, Walters was excluded from the trial for everything but his own testimony; and none of the arguments made or defenses listed in the answer and new matter to be filed (R 285A-300A) were made or briefed. Finally, LeRoy Walters was not permitted to

cross-examine any witnesses or have counsel for such purposes nor was it Ms. Yaw's duty to represent LeRoy Walters in the matter. Affidavit of LeRoy Walters (R 459A-460A).

Thus, the first articulation of any kind as to when LeRoy Walters became an indispensable party was by the lower court on June 4, 1996 in its Opinion without the basis for such inclusion.

In this matter, LeRoy L. Walters and Joan M. Day were married by common-law marriage on January 1, 1991. On January 25, 1993, the Court, after a hearing on November 9, 1992 where LeRoy L. Walters was excluded for all of the time other than his own testimony which is set forth in Pages 13 through 27 of the transcript (R 33A-48A). In addition, Mr. Walters was not represented by counsel, nor was he a party to the action nor did he have an opportunity to produce, examine or cross-examine witnesses through an attorney. The Court determined that the conception of Jabe Walters took place in the period of October-November,

1990, that LeRoy L. Walters and Joan Day Walters were married by common-law marriage on January 1, 1991 and that Jabe Walters was born August 10, 1991. The Court further concluded that the presumptive fatherhood of LeRoy L. Walters did not apply because there was a necessity of both conception and birth during the marriage for the presumption to apply. Other than the Superior Court opinion previously filed in this matter, no Pennsylvania appellate court has dealt with this particular issue. LeRoy L. Walters' position in this matter is that he is the presumptive father of Jabe Walters conclusively and irrebuttably based on the case of **John M. v. Paula T.**, 524 Pa. 306, 571 A2d 1380 (1990) and other cases, that both the history of the presumption and its application under the case law of Pennsylvania indicate that both conditions need not be present for the presumption to apply.

The matters set forth in the Petition to Intervene are set forth at this point:

9. Plaintiff took no measures to assert

any of his rights during the period of gestation and after the birth of Jabe A. Walters until the filing of this action on March 5, 1992.

10. Such failure to assert rights or to exercise any parental duties or to provide support constituted an abandonment by the Plaintiff of any rights with respect to Jabe A. Walters.

11. LeRoy L. Walters is entitled, should the Court determine for any reason that Plaintiff is the biological father of Jabe A. Walters, to an adoption of Jabe A. Walters and asserts such right in this action.

12. LeRoy L. Walters has not been joined as a party to this action as required by the Pennsylvania Rules of Civil Procedure 1915.6 and, therefore, has been deprived of his constitutional right of due process, of equal protection of the law, under the Constitutions of the United States of American and the Commonwealth of Pennsylvania.

13. LeRoy L. Walters has been deprived of his due process and equal protection of the laws rights under the Constitutions of the United States of America and the Commonwealth of Pennsylvania for the following reasons:

a) he was not provided with an opportunity to cross-examine at any point in the proceedings to date;

b) he was not permitted to call witnesses in this matter;

c) he was not advised of his rights as required by the Pennsylvania Rules of Civil Procedure;

d) he was not joined as a party by the Court as required by the Pennsylvania Rules of Civil Procedure; and

e) he was and is an indispensable party to this action.

14. LeRoy L. Walters has been deprived of his liberty interest with respect to Jabe A. Walters as in violation of the Constitutions of the United States of America and Commonwealth of Pennsylvania.

15. LeRoy L. Walters has at all times during the gestation and after the birth of Jabe A. Walters provided the total support of Jabe A. Walters.

16. LeRoy L. Walters has, beginning with the birth of Jabe A. Walters, observed and provided the duties and obligations of a father to Jabe A. Walters, both during the gestation and after the birth of Jabe A. Walters.

17. LeRoy L. Walters has bonded with Jabe A. Walters from the birth of Jabe A. Walters and has performed all of the duties of father for Jabe A. Walters.

18. Jabe A. Walters has bonded with LeRoy L. Walters and has recognized LeRoy L. Walters as his father since the birth of Jabe A. Walters.

19. Providing parental, custodial and/or visitation rights to Plaintiff would be detrimental to and the intact family of LeRoy L. Walters, Joan Day Walters and Jabe A. Walters since gestation and birth of Jabe A. Walters and continuing to the present.

20. The Plaintiff has assumed no parental duties of Jabe A. Walters, nor has Plaintiff provided any parental support for Jabe A. Walters at any time.

21. Since the birth of Jabe A. Walters, Plaintiff has not inquired about his health or well-being at any time.

22. The family of LeRoy L. Walters, Joan Day Walters and Jabe A. Walters has been intact as a unit both from the conception of Jabe A. Walters and at all times subsequent to the birth of Jabe A. Walters and has been an intact family prior to the conception of Jabe A. Walters.

23. This Court lacked and lacks jurisdiction of this matter.

24. The rights of LeRoy L. Walters have been seriously jeopardized by failure of the Court at any time to require his joinder as a party in this action and, therefore, LeRoy L. Walters is entitled to a proceeding de novo in this matter.

25. LeRoy L. Walters was and is an indispensable party to this action and as a result thereof, the Court had no jurisdiction to enter the Order in this case requiring blood testing and all actions and orders heretofore entered in this action are a nullity.

27. Any paternity testing done prior to the joinder of LeRoy L. Walters in this matter is inadmissible for any purpose and is a nullity. LeRoy L. Walters objects to any blood testing previously performed or to be performed in this matter for the following reasons:

c) That the Pennsylvania

Supreme Court in the case of **Everett v. Anglemeyer**, 625 A2d 1252 (Pa. Super 1993) has held that the requirements of both conception and birth within the marriage need not be present for the presumption that LeRoy L. Walters is the father of Jabe A. Walters to be conclusive and irrebuttable. In the case at bar, LeRoy L. Walters became the irrebuttably and conclusively presumptive father by supporting and holding out himself as the father of Jabe A. Walters since the marriage of LeRoy L. Walters and Joan M. Day on January 1, 1991.

d) Alan C. Metzger has waived all rights to claim that he is the father of Jabe A. Walters by failing to commence this action within six (6) months of the birth of Jabe A. Walters, during which time, LeRoy L. Walters assumed the care and custody and parental duties for Jabe A. Walters, as his father, and has supported and continued supplying those parental duties since that time set forth in (c) above and to the present date.

e) Alan C. Metzger is estopped from challenging

the rights of LeRoy L. Walters as the presumptive father of Jabe A. Walters because LeRoy L. Walters and Joan M. Walters are estopped from denying that they are the parents of Jabe A. Walters.

f) Allowing for the blood tests of Joan M. Walters, Jabe A. Walters and Alan C. Metzger cannot prove that Alan C. Metzger is the father of Jabe A. Walters, inasmuch as no blood test has been requested or taken of LeRoy L. Walters as required by Pennsylvania law in order to overcome the presumption that LeRoy L. Walters is the father of the child, Jabe A. Walters.

j) Further carrying on of this lawsuit by Allen C. Metzger will seriously disturb the intact family unit of LeRoy L. Walters, Joan M. Walters, Jabe A. Walters and Samuel Levi Walters.

m) LeRoy L. Walters, as father of Jabe A. Walters, has a right not to have his son submitted to a blood test or DNA test without his permission or after a court order where he is a party to the proceeding.

31. Plaintiff is estopped from assert-

ing paternity with respect to Jabe A. Walters and is estopped both equitably and collaterally.

32. LeRoy L. Walters, by assuming his parental duties and responsibilities, changed his position irrevocably and Plaintiff is estopped both legally and equitably in all ways from asserting rights with respect to Jabe A. Walters.

On the 18th day of June, 1996, the Appeal of Appellant was taken to the Superior Court, who, after argument, quashed the Appeal for the reasons set forth in its Opinion appended hereto.

SUMMARY OF ARGUMENT

Although, required to be joined in this matter by the Pennsylvania Rules of Civil Procedure and because he is an indispensable party as declared by the Court of Common Pleas for both the paternity and custody actions and because failure to join an indispensable party nullifies all prior proceedings in this matter, the failure to join LeRoy L. Walters prior to issuing Orders for the blood testing of LeRoy L. Walters, wife and son and all things heretofore done are a nullity.

The failure to join an indispensable party, therefore, involves a matter of personal jurisdiction and the appeal in this matter should not have been quashed.

ARGUMENT

I. FAILURE TO JOIN LeROY L. WALTERS AS AN INDISPENSABLE PARTY IN THIS MATTER PRIOR TO ORDERING BLOOD TESTING TO BE DONE NULLIFIES THE PRIOR BLOOD TESTING TAKEN IN THIS MATTER AND THE FAILURE TO JOIN HIM AS AN INDISPENSABLE PARTY PRIOR TO HIS PETITION TO INTERVENE AS REQUIRED BY THE PENNSYLVANIA RULES OF CIVIL PROCEDURE DENIES LeROY L. WALTERS DUE PROCESS UNDER BOTH THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS.

Walters was simply not a party to the suit prior to October 31, 1995. He had no counsel, he had no opportunity to cross-examine, he was excluded from the courtroom for all but his own testimony and Appellant believes that this denies him (1) due process, procedural and substantive, (2) equal protec-

tion of the laws, (3) his liberty interest in the custody and nurture of his son, Jabe Walters, and (4) this denies him these rights under both the United States and Pennsylvania Constitutions. See United States Constitution, Amendment V (liberty interest and due process of law), Amendment XIV, Section I (liberty, due process of law and equal protection of the law). See Pennsylvania Constitution, Article I, Section I - Liberty, Section XXVI - Discrimination by the Commonwealth and its political subdivisions denying LeRoy Walters enjoyments of any civil right and discrimination against him in the exercise of his civil rights, Section XI, Article I- Due Process and Article I, Section I - Equal Protection of the Law.

See generally Pennsylvania Law Encyclopedia, Constitutional Law §§241, et seq, Equal Protection of the Laws; §§271, et seq, Due Process and §§291, et seq, Deprivation of Liberty Interest and cases cited therein.

In Pennsylvania, if a party is an indispensable party to the action, the Court has no jurisdiction to hear the case. **DeCoatesworth v. Jones**, 536 Pa. 414, 639 A2d 792 (Pa. Supreme, 1994). The Supreme Court of Pennsylvania reversed the Superior Court's holding that once the Supreme Court denied allocatur, the proceedings were concluded and the matter could not be raised. The Supreme Court of Pennsylvania stated "We cannot agree." and then stated as follows: "It is never too late to attack a judgment or decree for want of jurisdiction. That question is always open." **In Re Simpsons Estate**, 253 Pa. 217, 225, 98A 35, 38 (1916), "Such a judgment is entitled to no authority or respect and is subject to impeachment in collateral proceedings at any time by one whose rights it purports to effect." **Moskowitz's Registration Case**, 329 Pa. 183, 190, 196A 498, 502 (1938). "For want of jurisdiction over the subject matter may be questioned at any time, it may be questioned either in the trial court,

before or after judgment, or before the first time in appellate court and it is fatal at any stage of the proceedings, even when collaterally involved ..." **In Re Paterson's Estate**, 341 Pa. 177, 180, 19 A2d 165, 166 (1941) (emphasis added). Moreover is [sic] "well settled that a judgment or decree rendered by a court which lacks jurisdiction of the subject matter or of the person is null and void and is subject to attack by the parties in the same court or may be collaterally attacked at any time." **Commonwealth ex rel Howard v. Howard**, 138 Pa. Super 505, 508, 10 A2d 779, 781 (1939). **DeCoatesworth v. Jones**, 414 Pa. Super 589, 604, 607 A2d 1094, 1101.

As the Pennsylvania Superior Court stated in the case of **Hart v. O'Malley**, 647 A2d 542, 549 (Pa. Super, 1994), "the absence of an indispensable party goes absolutely to the court's juris-diction. **Sprague v. Casey**, supra; **Columbia Gas Transmission Corp. v. Diamond Fuel Co.**, supra; **Tigue v. Basalyga**, 451 Pa. 436, 304 A2d 119 (1973). If an indis-

pensable party is not joined, a court is without jurisdiction to decide the matter. **Fiore v. Oakwood Plaza Shopping Center**, 401 Pa. Super 446, 585 A2d 1012 (1991); **Burkett v. Smyder**, 369 Pa. Super 519, 535 A2d 671 (1988); **Nelson by Nelson v. Dibble**, 353 Pa. Super 537, 510 A2d 792 (1986); **Barren v. Dubas**, 295 Pa. Super 443, 441 A2d 1315 (1982). See also **Columbia Gas Transmission Corp. v. Diamond Fuel Co.**, supra. The issue of 'the failure to join an indispensable party' cannot be waived. **Fiore v. Oakwood Plaza Shopping Center Inc.**, supra; **Nelson by Nelson v. Dibble**, supra."

The Court is cited to the case of **Mechanicsburg Area School District v. Kline**, 431 A2d 953 (Pa. Supreme, 1981). In that case, the Supreme Court stated, "The determination of an indispensable party question involves at least these considerations:

1. Do absent parties have a right or interest related to the claim?

2. If so, what is the nature of that right or interest?

3. Is that right or interest essential to the merits of the issue?

4. Can justice be afforded without violating the due process rights of absent parties?"

An indispensable party is one whose "rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights." **DeCoatesworth v. Jones**, 607 A2d 1094, 1098 (Pa. Super, 1992). The court went on to further explicate the nature of an indispensable party. "A party is indispensable when he has such an interest that a final decree cannot be made without effecting it or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience ... The rule as to indispensable parties is neither technical nor one of convenience; it goes absolutely to the jurisdiction, and without their presence the court can grant no relief. Thus, were the object of a bill is to divest a

title to a property, the presence of those holding or claiming such title is indispensable."

At the very least, when the Court decided on the Motion for Declaratory Judgment that LeRoy L. Walters and Joan Walters were married in a common-law marriage on January 1, 1991, the Court had a duty at that point to join LeRoy L. Walters in the proceedings so that he would have an opportunity to litigate the question of whether his paternal, custodial and parental rights could be effected by the paternity and custody action involving DNA testing of the Plaintiff in this matter.

At the hearing of October 31, 1995, the Court stated that it would not allow argument on the assertion that every order heretofore was a nullity. The Court stated, inter alia, "I do not feel this is a nullity as far as the proceedings before this. It is true and Alan Metzger and Joan Day Walters were the only parties, but your client, Mr. Walters, was in

Court. He testified that he was an integral part of that, and that is, I believe, has already been determined. You raised that once before, did you not?" to which this attorney responded, "No, we did not raise the issue of indispensable party before." No proceedings prior to the Petition to Intervene, that was granted by the Court, raised the issue of indispensable party. However, under the laws of Pennsylvania, the question of jurisdiction of the court may be raised at any time and collaterally attacked and the proceedings collaterally attached. Thus, res judicata and collateral estoppel do not apply to this matter.

Thus, it is submitted that Appellant has not received due process under either the Pennsylvania or United States Constitutions in this matter or the matters other Constitutional provisions of Amended 14 §1, set forth supra.

II. THE FAILURE TO JOIN AN INDISPENSABLE PARTY INVOLVES MATTERS OF PERSONAL

JURISDICTION AND, THEREFORE, THE APPEAL TAKEN IN THIS MATTER WAS PROPER UNDER THE PENNSYLVANIA RULES OF APPELLATE PROCEDURE.

While it has been admitted by the lower court that LeRoy L. Walters is an indispensable party in this matter, LeRoy L. Walters has been denied his rights as an indispensable party and including the right to litigate whether any blood testing should have been taken of anyone involved. Indispensability of the party necessarily involves the assumption of personal jurisdiction over LeRoy Walters by the court. Therefore, appeal taken in this matter was proper and valid.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By _____
John C. Youngman, Jr.
I.D. No. 07582
Attorneys for Appellant

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PENNSYLVANIA

ALAN C. METZGER, Plaintiff/Petitioner	:	
vs.	:	
JOAN M. DAY and LEROY L. WALTERS, Defendants/Respondents	:	No. 92-20372

OPINION AND ORDER

This matter came before the court on Defendant Leroy Walters' preliminary objections. These objection will be denied. First, Mr. Walters made the same assertion that all matters plead and/or litigated before he was joined as a party are a nullity before the Honorable Clinton W. Smith at the hearing held on or about October 31, 1995 regarding Mr. Walters petition to intervene. Although Judge Smith did state that Mr. Walters is an indispensable party in both the paternity and the custody suits, he also held that all prior proceedings were not a nullity. Transcript of proceedings held October 31, 1995 at pp. 12-17. It is well-settled that judges of coordinate jurisdiction sitting in the same court

and in the same case cannot overrule the decisions of each other. Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326, 1331 (1995); Okkerse v. Howe, 521 Pa. 509, 556 A.2d 827, 831 (1989); Golden v. Dion & Rosenau, 410 Pa.Super. 506, 510, 600 A.2d 568, 570 (1991). As the Superior Court aptly stated in Golden: "Once a matter has been decided by a trial judge the decision should remain undisturbed, unless the order is appealable and an appeal therefrom is success-fully prosecuted." Id. Furthermore, upon review of the transcript and after conferring with my esteemed colleague, Judge Smith, this court finds that the statement regarding Mr. Walters indispensability and the prior pro-ceedings not being a nullity are consistent. Judge Smith found that Mr. Walters was indispensable as of October 1995 and for all subsequent proceedings, but he was not indispensable for the proceedings which occurred prior to October 1995. Mr. Walters would not have been indispensable initially for the following

reasons:

(1) The initial proceeding was to compel blood testing of Ms. Day and the child; Plaintiff was not seeking relief from Mr. Walters. See Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 658 A.2d 336 (1995).

(2) Mr. Walters was present at the November 1992 proceedings and testified.

(3) Mr. Walters' interests including, but not limited to, preserving the family unit were skillfully presented by Ms. Day and her attorney.

Even if Mr. Walters was indispensable in 1992, we would make the same decision today. Mr. Walters and Ms. Day both admitted that Ms. Day discovered she was pregnant prior to January 1, 1991, the date of their common law marriage.[1] The only dispute is the legal conclusion to be drawn from these facts. Mr. Walters has been joined as a party and we heard his argument regarding the marital presumption at oral argument on his preliminary

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[1]We note that if Mr. Walters is an indispensable party and all proceedings prior to October 31, 1995 are a nullity, both the common law marriage issue and the presumption would need to be litigated.

objections. We would find the presumption inapplicable based on Selm v. Elliott, 411 Pa.Super. 602, 602 A.2d 358 (1992), since the child clearly was not conceived during Mr. Walters and Ms. Day's marriage. Further hearing would not be necessary. This would be similar to our granting summary judgment in favor of Mr. Metzger. In a summary judgment setting, a judgment can be entered against a party based on his or her admissions without violating that party's due process rights. Similarly, based on Walters' and Day's own statements there would not be an issue of fact and Metzger would be entitled to judgment as a matter of law on the issue of the applicability of the marital presumption.

ORDER

AND NOW, this 4th day of June 1996, Defendant Leroy Walter's preliminary objections are DENIED.

By the Court,

K D Brown /s/
Kenneth D. Brown, J.

cc: John Youngman, Jr., Esq.
David Irwin, Esq.
Janice Yaw, Esq.
Patricia Bowman, Esq.

ALAN C. METZGER	:	IN THE SUPERIOR
	:	COURT OF
v.	:	PENNSYLVANIA
	:	
JOAN M. DAY AND	:	
LEROY L. WALTERS,	:	
APPELLANT	:	NO. 471 HARRISBURG
	:	1996

Appeal from the **ORDER ENTERED** June 4, 1996 In the Court of Common Pleas, Civil Division Lycoming County, No. 92-20372

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal from the order entered 6/4/96 of the Court of Common Pleas of Lycoming County be, and is QUASHED. Jurisdiction Relinquished.

By the Court,

David A. Szewczak /s/

Prothonotary

Dated: Jul 3 1997

APPENDIX B

ALAN C. METZGER	:	IN THE SUPERIOR
	:	COURT OF
v.	:	PENNSYLVANIA
	:	
JOAN M. DAY AND	:	
LEROY L. WALTERS,	:	
APPELLANT	:	NO. 471 HARRISBURG
	:	1996

Appeal from the **ORDER ENTERED** June 4, 1996 In the Court of Common Pleas, Civil Division Lycoming County, No. 92-20372

BEFORE: CAVANAUGH, POPOVICH and OLSZEWSKI, JJ.

FILED JUL 3 1997

MEMORANDUM:

Appellant, LeRoy L. Walters, appeals from the interlocutory order of the Court of Common Pleas of Lycoming County, denying his preliminary objections. Because the appeal is not properly before us, we are compelled to quash it.

The procedural history of this case is as follows: On March 5, 1992, appellee, Alan C. Metzger, filed a petition to establish paternity of the minor child, J.A.W. This was followed by a complaint for partial custody of the child, filed on April 10, 1992. Blood tests for J.A.W. and his mother, Joan M. Day, were ordered on April 23, 1992, however, this

order was subsequently vacated when Ms. Day raised the defense that the child was born to a common-law marriage, and therefore, it was improper to order such tests. McCue v. McCue, 413 Pa.Super. 71, 604 A.2d 738 (1992) (the presumption that a child born to a married woman is a child of the marriage, and therefore of the woman's husband, is one of the strongest presumptions known to the common law).[1]

On January 25, 1993, after a hearing, the trial court, per the Honorable Clinton W. Smith, determined that a common-law marriage existed between Ms. Day and Mr. Walters. Based on the testimony of Ms. Day and Mr. Walters, the date the common-law marriage commenced was found to be January 1, 1991. The child, who was born in August of 1991, was found to have been conceived in November

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[1] We note that in Pennsylvania, a common-law marriage is an "actual" marriage and a formal ceremony is not necessary. Sprague v. Kaplan, 392 Pa.Super. 257, 260 n.1, 572 A.2d 789, 791 n.1 (1990).

of 1990. Therefore, the trial court determined that because the child was conceived prior to the date the parties entered into the common-law marriage, the marital presumption of paternity is inapplicable. Selm v. Elliot, 411 Pa.Super. 602, 602 A.2d 358 (1992) (presumption that a child is the child of the woman's husband exists where a child is conceived and born to a married woman). Thereafter, blood testing of the mother and child was scheduled once again.

Ms. Day appealed the trial court's finding that the marital presumption of paternity did not apply and Mr. Metzger appealed the trial court's finding of a common-law marriage. On appeal, this court affirmed both findings in a memorandum decision. Subsequently, the trial court directed that paternity blood testing of Ms. Day and J.A.W. was to take place on January 10, 1995. On January 9, 1995, appellant, Mr. Walters, filed his own petition against Mr. Metzger, seeking the following: to prevent the blood testing

of Ms. Day and J.A.W.; to prevent the use of the results of any blood test in a paternity action; for the court to declare J.A.W. a child of his marriage to Ms. Day; and for an order declaring that he is irrebuttably and conclusively presumed to be the father of J.A.W. On January 10, 1995, the trial court, per Judge Smith, denied the request to stay the paternity test as moot and dismissed the remainder of the action.[2]

On January 20, 1995, Mr. Walters filed for reconsideration of the trial court's decision of January 10th. The basis for Mr. Walters' petition for reconsideration was that the trial court's original opinion of January 25, 1993, regarding the common-law marriage and the marital presumption of paternity in the case involving Mr. Metzger and Ms. Day, had misstated the date of the common-law marriage. Mr. Walters argued that this mis-

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[2] Blood testing was completed on Ms. Day and J.A.W. on January 10, 1995, as scheduled.

statement created an ambiguity which may have resulted in the supreme court's refusal to grant allocatur.[3] On January 27, 1995, in denying Mr. Walters' petition for reconsideration, the trial court corrected its typographical error by order and found that there was no ambiguity created by the inclusion of the error. The trial court noted that the basis of this court's decision was that although the child was born into an intact marriage, he was conceived prior to when that

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[3] The opinion filed on January 25, 1993 contained two typographical errors in which the date the common-law marriage commenced was incorrectly set forth as January 1, 1992. The true date of the marriage, January 1, 1991, appeared four times in the opinion.

In the memorandum decision affirming the trial court's findings, this court also misstated the date the common-law marriage commenced. However, the sentence containing the typographical error was clearly structured after the trial court's sentence in which the error is contained. Additionally, the next paragraph of the memorandum refers to the time between when the common-law marriage was entered into and the child's birth, demonstrating this court's understanding that the child, who was born on August 10, 1991, was born into an existing marriage.

marriage commenced.[4]

On February 9, 1995, and February 16, 1995, Mr. Walters appealed to this court from the orders entered January 10th and January 27th, 1995. In so doing, appellant included with his own caption, the caption of the action between Mr. Metzger and Ms. Day. Mr. Walters requested that the judgment previously entered in the prior action be reopened or stayed. In response, Mr. Metzger filed a Petition to Quash Mr. Walters' appeal on the basis that final judgment of the case between Mr. Metzger and Ms. Day had already been entered by way of the supreme court's refusal to grant allocatur. This court granted the quashal on May 10, 1995. By the same order, this court also dismissed as moot Walters' other appeal, regarding the trial court's disposition of the claims raised in the

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[4] Had this court based its decision on the incorrect date of marriage, January 1, 1992, the child would have been thought to have been conceived and born after the commencement of that marriage.

petition filed January 9, 1995. Subsequently, Mr. Walters attempted to file a petition for allocatur to our supreme court, which was returned by the court as untimely.

On July 10, 1995, Mr. Walters filed a petition to intervene as an indispensable party in the paternity and custody actions involving Mr. Metzger and Ms. Day. This petition was granted by Judge Smith after a hearing on October 31, 1995. It was at this hearing that Mr. Walters first made the argument that, because he was named an indispensable party in the actions involving the paternity and the custody of J.A.W., all prior proceedings in these matters have been rendered a nullity for lack of jurisdiction.

Thereafter, appellant filed preliminary objections in which he objected to

> the proceedings and Orders of this matter issued prior to the joining of LeRoy L. Walters in the above captioned matter as an indispensable party on the ground that the Court lacked jurisdiction with respect to the proceedings and issuance of any Orders issued prior to the joinder of LeRoy L. Walters and lacked sub-

ject matter jurisdiction of this action.

The Honorable Kenneth D. Brown dismissed these preliminary objections by order entered June 4, 1996. It is from this order that Mr. Walters now appeals.[5]

Appellate jurisdiction is generally limited to appeals from final orders unless provided otherwise by statute. West v. Anderson, 426 Pa.Super. 127, 129, 626 A.2d 606, 607 (1993). The Order appealed from is clearly interlocutory in character. See, Rosenwald v. Barbieri, 501 Pa. 563, 462 A.2d 644 (1983) (an order dismissing preliminary objections is interlocutory). This court has jurisdiction of appeals from interlocutory orders only where specially authorized by statute or general rule. Pennsylvania Higher Education Assistance Agency v. Di Massa, 296

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[5] We note with disapproval the several deficiencies in appellant's brief. Notably missing are: the statement of jurisdiction; the Order or other determination in question; and a summary of the argument, all required to be included under Pa.R.A.P. 2111.

Pa.Super. 529, 442 A.2d 1177 (1982) (citations omitted). Appeals of interlocutory orders are generally governed by 42 Pa.C.S. §702 and Pa. R.A.P. 1311. 42 Pa.C.S. §702 provides, in subsection (b):

> When a court or other governmental unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such an order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

Pursuant to Pa.R.A.P. 1311(b), to have properly preserved this issue for appeal, appellant was required to apply, within thirty days after the entry of the interlocutory order, for an amendment of the interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. §702(b). Appellant failed to file such a petition. However, even if we were to find that the

order of June 4, 1996 meets the requirements of certifying the interlocutory order for immediate appellate review, Pa.R.A.P. 1311(b) further requires appellant to file a petition with this Court seeking permission to appeal the interlocutory order. Appellant has failed to do so.

We have long held in accordance with Rule 1311, an appellant is required to file such a petition and that a §702 certification by the lower court alone is not sufficient to establish jurisdiction with our court. See, Gellar v. Chambers, 292 Pa.Super. 324, 325, 437 A.2d 406, 407 (1981) (citation omitted).

Therefore, this court has jurisdiction of this appeal only if it involves matters as to which interlocutory appeal as of right is granted by statute or rule. Appellant's claim is that "the Court lacked jurisdiction with respect to the proceedings and issuance of any Orders issued prior to the joinder of LeRoy L. Walters and lacked subject matter jurisdiction of this action." While earlier cases did hold

that blanket jurisdiction over appeals from orders determining jurisdiction over the defendant or the cause of action did exist in this court,

> these cases were decided under Act of March 5, 1925, P.L. 23, §1, then 12 P.S. §672 which conferred jurisdiction of appeals from orders ruling on a "question of jurisdiction...of the cause of action for which the suit is brought...." This act was superceded by Act of July 9, 1976, P.L. 586, No. 142, §2 as amended, 42 Pa.C.S. §5105. Subsection (c) relating to interlocutory appeals places in the Supreme Court of Pennsylvania the authority to promulgate general rules establishing rights to appeal from specific classes of interlocutory orders. Pursuant to this authority, Pa. R.App.P. 311 specifies those interlocutory orders from which appeal may be taken as of right. Subsection (b) states:
>
> > An appeal may be taken as of right from an order in a civil action or proceeding sustaining venue of the matter or jurisdiction over the person or over real or personal property [if:
> >
> > > (1) the plaintiff, petitioner or other party benefiting from the order files of record within ten days after the entry of the order an election that the

order shall be deemed final; or
(2) the court states in the order that a sub-stantial issue of venue or jurisdiction is presented.]

Pennsylvania Higher Education Assistance Agency v. Di Massa, supra at 532, 442 A.2d at 1178 (citations and footnote omitted).

Appellant has filed what he purports to be an "Election to Treat the Court's Order of June 4, 1996 as a Final Order Pursuant to PA Rule of Appellate Procedure 311(b)(1)." However, because appellant has made no challenge of the lower court's personal or in rem jurisdiction, we find Pa.R.A.P. 311 to be inapplicable in this matter.[6] See, Martino v.

[6] Additionally, we note that the election that the order be deemed final applies only to the "plaintiff, petitioner or other party benefiting from the order." The explanatory note following this rule reveals that its purpose is to allow a plaintiff to "file such an election where he desires to force the defendant to decide promptly whether the objection to venue or jurisdiction will be seriously pressed." Therefore, even had Rule 311 applied to the instant matter, it was not for appellant to make such an election of finality, and therefore, the Order would still not be

Transport Workers' Union of Philadelphia, Local 234, 505 Pa. 391, 393 n.2, 480 A.2d 242, 243 n.2 (1984) (orders sustaining personal or in rem jurisdiction are interlocutory appeals as of right under Pa.R.A.P. 311(b), but all other orders sustaining jurisdiction are interlocutory and appealable only by allowance); see also, Pennsylvania Higher Education Assistance Agency v. Di Massa, supra (no provision of rule of appellate procedure specifying those interlocutory orders from which an appeal may be taken as of right confers jurisdiction on appeal from an order sustaining subject matter jurisdiction under any conditions).

We note that appellee has not filed any objection to this court's assumption of jurisdiction over this appeal. While such circumstances might operate to perfect the appellate jurisdiction of this court in other situations, Pa.R.C.P. 741 specifically pre-

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properly before this court.

cludes such a result in cases involving interlocutory orders such as the one presented in the instant case.[7] Gellers v. Chambers, supra.

Appeal quashed. Jurisdiction is relinquished.

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[7] Pa.R.C.P. 741 provides:

(a) General rule. The failure of an appellee to file an objection to the jurisdiction of an appellate court on or prior to the last day under these rules for the filing of the record shall, unless the appellate court otherwise orders, operate to perfect the appellate jurisdiction of such appellate court, notwithstanding any provision of law vesting jurisdiction of such appeal in another appellate court

(b) Exception. Subdivision (a) shall not apply to any defect in the jurisdiction of an appellate court which arises out of:

(1) The failure to effect a filing within the time provided by these rules.

(2) An attempt to take an appeal from an interlocutory order which has not been made appealable by Rule 311 (interlocutory appeals as of right) or pursuant to Chapter 13 (interlocutory appeals by permission).

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

ALAN C. METZGER	:	No. 181 M.D.
	:	Misc. Dkt. 1997
v.	:	
	:	
JOAN M. DAY	:	
	:	
v.	:	
	:	
LEROY L. WALTERS, Petitioner	:	

ORDER

PER CURIAM:

AND NOW, this 14th day of November, 1997, the Petition for Review is denied.

TRUE & CORRECT COPY

ATTEST: NOV 17 1997

Shirley Bailey /s/
SHIRLEY BAILEY
CHIEF CLERK

APPENDIX C